REASONS FOR DENYING THE WRIT

I. THE CALIFORNIA SUPREME COURT'S HOLDING THAT NEITHER THE "GRANDFATHER CLAUSE" NOR A COLA PREEMPTS SECTION 25241 IS HARMONIOUS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

Bronco's attempt to manufacture a "conflict" ignores this Court's frequent reminders that a preemptive effect of federal law should not be lightly inferred "[f]or the State is powerless to remove the ill effects of our decision, while the federal government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). Even in construing express preemption clauses, courts must remain alert that Congress "does not cavalierly" preempt state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

The Petition advances no claim of express preemption, inability to comply with both federal and California law, or field preemption. Instead, it is contended that Section 25241 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Such a conflict exists only if California's law would "seriously compromise important federal interests." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 389 (1983); *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 671 (2003) (Breyer, J., concurring). The California Supreme Court applied well-settled principles of Supremacy Clause jurisprudence in rejecting Bronco's claim.

Section 25241 does not obstruct the purposes or objectives of federal law. Thus, the California Supreme Court would have reached the same decision in rejecting Bronco's claim of preemption even without applying any presumption against preemption. In any case, its analysis of the presumption was sound. No circumstances warrant this Court's review.

A. The California Supreme Court's Decision Is Consistent With This Court's Implied Conflict Preemption Cases

In analyzing whether the minimum labeling standards promulgated in the grandfather clause were intended to foreclose supplemental state regulation, the California Supreme Court properly engaged in a searching inquiry of the history, structure and context of the federal regulation. App. 15a-59a. This approach breaks no ground and is neither incorrect nor "dangerous." The same analysis was undertaken in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), where this Court rejected a claim that the Federal Boat Safety Act of 1971 ("FBSA"), a federal act designed to "improve the safe operation of recreational boats," preempted a state tort action brought against an outboard motor manufacturer premised on the absence of a propeller guard. The FBSA had sought to establish "national construction and performance standards for boats" and to encourage "uniformity of boating laws and regulations as among the several States and the Federal Government." *Id.* 56-57. Pursuant to its delegated authority, the Coast Guard had considered and rejected a proposed propeller guard requirement, finding that the guard created some safety problems as it solved others, and was

economically unfeasible. *Id.* 61.[9] In holding that the federal standard did not preempt state tort law liability, this Court explained that an intent to preempt stricter state standards could not be inferred from the fact that federal law authorized recreational boats to be marketed without such guards. "Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards." *Id.* 67. The California Supreme Court reached a parallel conclusion regarding the grandfather clause:

> We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general matter* its grandfather clause was appropriate so as to avoid destroying an "entire class" of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns.

App. 66a.

The petition attempts to analogize the grandfather clause to the Secretary of Transportation's decision (against a monolithic federal requirement of airbags for all cars) found preemptive in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), but the comparison rings hollow. *See* Pet. 14. In fact, *Geier* illustrates the necessary predicate for

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[9] Thus, *Sprietsma* involved a federal rejection of the very requirement on which state law liability was premised, but the preemption challenge still failed. Here, the asserted conflict is even more illusory, as petitioners can point to no consideration and rejection of Section 25241 by either Congress or BATF.

implied conflict preemption that is so conspicuously absent here. *Geier*'s holding that the state common law claim was preempted by a safety standard promulgated by the Department of Transportation did not spring from the fact that federal law authorized the subject Honda to be marketed without an airbag, as it surely did, whereas the state law claim would penalize the authorized activity. Instead, this Court exhaustively probed the purposes of the federal allowance (*id.* 875-881), and concluded that federal policy affirmatively sought experimentation with a mix of differing restraint devices to "lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote safety objectives." *Id.* 874-875. Allowing the state common law tort claim, which argued that all cars must have airbags to be safe (*id.* 885-886), would directly undermine these concrete federal objectives, and for that reason the federal authorization was found to be in conflict with, and to preempt, state tort liability.[10]

All of this Court's preemption cases cited by Bronco as in supposed "conflict" with the decision below involved the same particularized findings of interference, impairment or obstruction of federal objectives, thus starkly contrasting with the relationship between the grandfather clause and the modest supplemental regulation engendered by Section 25241. *McDermott v. Wisconsin*, 228 U.S. 115 (1913), for example, held that a Wisconsin statute was

[10] This Court allowed that a more narrowly tailored airbag requirement for "some design-related circumstance concerning a particular kind of car" might well escape preemption as not posing a real threat to the federal regulation's mixed-fleet objective. *Id.* 885-886.

preempted because it required the removal of federally approved labels on syrup cans prior to their sale, thereby destroying both the government's and the shipper's ability to demonstrate compliance with federal law. *Id.* 134. In *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), this Court construed the complex state and federal power sharing scheme of the Federal Power Act to preempt a state construction permit requirement for a mammoth federal project consisting of an earthen dam, 11,000 acre reservoir and eight mile diversion canal. Requiring contractors to obtain an Iowa permit "easily could destroy the effectiveness of the federal act" given that one requirement of Iowa's Code would mandate a size reduction that the Federal Power Commission found "neither desirable nor adequate," and would impose engineering requirements that "would handicap the financial success of the project." *Id.* 157, 167. Similarly, in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), many provisions of Washington State law imposing safety standards for oil tankers operating in Puget Sound were struck down, with the Court noting that Congress sought an exclusive federal regime to control oil tanker design, and that differing state standards would frustrate the Congressional preference for uniform international standards for tank vessel construction. *Id.* 165-166 & 168.[11]

[11] *See also Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (federal law specifically empowered banks to sell insurance); *Leslie Miller v. Arkansas*, 352 U.S. 187, 190 (1956) (Armed Services Procurement Act preempted Arkansas law requiring state contractor's license for construction work on Air Force Base because state law would "frustrate the expressed federal policy of selecting the lowest responsible bidder."); *Sperry v. Florida*, 373 U.S. 379, 401-402 (1963) (Florida preempted from requiring state bar membership for attorneys registered to practice before United States Patent Office, as enforcement of

(Continued on following page)

By contrast, the record does not remotely reflect that Section 25241 would impair any significant federal interests or objectives, and the decision of the California Supreme Court does not conflict with this Court's decisions invalidating state laws when a true obstruction of federal objectives is discerned. The BATF has been virtually silent respecting the rationale for the grandfather clause. The Petition points to 51 Fed. Reg. 20,481 (June 5, 1986) which states: "ATF believes that the final rule will provide industry with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names." There is no indication that this comment is referring to the grandfather clause in particular, and it more logically appears connected to the immediately preceding paragraph concerning the location of the bottling winery, or to the rule regulating the use of the word "brand" in conjunction with a brand name. Certainly the grandfather clause has no impact on the "flexibility" with which wine labels can be designed.[12]

> ATF believes that the brand name, usually the most prominent item on a wine label, in certain instances conveys information to the consumer. In the case of a geographic brand name of viticultural

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state law would have disruptive effect on Patent Office, subjecting 50% of its practitioners to possible disqualification).

[12] Bronco's suggestion that the grandfather clause reflects a determination by BATF that the consumers of existing geographic brand names understood that the brand names were not suggestive of the origin of the wines (Pet. 4) is spun from whole cloth. The grandfather clause makes no distinction between brand names that were in use for one week versus fifty years before July 7, 1986, nor between producers having gigantic and minuscule production levels.

> significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown.

51 Fed. Reg. 20,481 (June 5, 1986).

The most that can be said is that the federal agency chose not to impose the prohibitory rule on the whole class of pre-July 7, 1986 producers. Nothing in the history or structure of the FAA Act or the grandfather clause suggests that in making this election, BATF intended to confer on each grandfathered brand name owner an immunity from state co-regulation regardless of local considerations, nor that the grandfather clause "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

B. The Application Of A Presumption Against Preemption Is Soundly Grounded In Federal Precedent

A presumption against federal preemption applies when Congress legislates in a field historically occupied by the States in the exercise of their police powers. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As expressed in *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (internal quotations and citations omitted):

> When Congress legislates in a field traditionally occupied by the States, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain

> that this is an area traditionally regulated by the States.

Accord, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 710 (1985).

Section 25241 is precisely the kind of state statute to which the presumption against preemption applies. The statute was enacted in furtherance of consumer protection:[13]

> The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.

Cal. Bus. & Prof. Code § 25241(a).

California, having the world's fifth largest economy, has a paramount interest in regulating products produced within and emanating from its own borders. "States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). A State's police powers extend as much to preventing consumer deception

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[13] The purpose of Section 25241 is thus complementary to Congress' objectives in enacting the Federal Alcohol Administration Act to inhibit consumer deception. *See* 27 U.S.C. § 205. The presumption against preemption has "special force" when "the two governments are pursuing 'common purposes.'" *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 666, *citing New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

as to assuring that food is healthful and safe. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146. This Court has long recognized that traditional police powers enable a State to take measures to preserve the reputation of its products and industries in other states and abroad. *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

Bronco seeks to deflect these decisions, urging categorically that any presumption against preemption evaporates in "conflict-preemption" cases (Pet. 16). *Geier* made no such pronouncement, and indeed made clear that in all cases the burden of establishing an "actual conflict" rests with the party urging preemption. "And in so concluding [that the state tort action would undermine federal objectives], we do not 'put the burden' of proving pre-emption on petitioners. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict." *Geier, supra*, at 883. This Court reiterated: "While we certainly accept the dissent's basic position that ***a court should not find pre-emption too readily in the absence of clear evidence of a conflict***, (citation), for the reasons set out above we find such evidence here." *Geier, supra*, at 885 (emphasis added).

The authorities cited by Bronco do not establish any Circuit conflict on the applicability of a presumption in "conflict-preemption" cases. Pet. 18-19. The Fifth Circuit has very recently applied such a presumption in a conflict case. *Planned Parenthood of Houston & SE Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005). Its earlier decision in *Wells Fargo Bank v. James*, 321 F.3d 488, 491, 493 (5th Cir. 2003) recognized the overriding objective of effectuating the intent of Congress, and expressly confined its analysis to "the field of banking regulation."

In *Pharmaceutical Research and Manufacturers of America v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) (*citing New York State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 421), the Eleventh Circuit observed that "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." Bronco's citation of *Cliff v. Payco Gen. Am. Credits*, 363 F.3d 1113, 1122 (11th Cir. 2004) is, at the least, inapt, as that decision proceeded from a baseline assumption that the States' police powers are not to be preempted in the absence of a clear and manifest Congressional purpose to do so. Indeed, *Cliff* ultimately turned on the Eleventh Circuit's conclusion that no conflict between federal and state law existed at all, unless the federal law was given an absurd construction that would contemplate "third-party debt collectors attempting to collect debts that are not legitimate or asserting rights that do not exist." *Id.* 1129. There is no Circuit conflict that warrants this Court's intervention.

Nor does Section 25241 operate in an arena so dominated by a federal presence that the normal operation of California's police powers should be emasculated. The California Supreme Court undertook a scholarly and painstaking examination of the history of the federal and State regulation of food and agricultural products and production, and of the wine industry and wine labeling in particular (App. 15a-59a), and its analysis leaves no doubt that Section 25241 operates in a domain that "traditionally has been regulated by the states." App. 14a.

Certainly California's regulation of wine labels deceptively suggesting a Napa origin bears no resemblance to Washington State's attempted control of oil tankers

operating in navigable waters, which reverberated to the "embarrassment from intervention of the separate States" in maritime affairs, a circumstance that "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *United States v. Locke*, 529 U.S. 89, 99 (2000).

The litany of supposedly conflicting "*Locke* exception" cases cited by Bronco provides a gossamer excuse to seek this Court's review. The cases are not in conflict. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) does not mention, much less apply, the *Locke* case. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2nd Cir. 2005) did no more than mention *Locke* in passing, and cited the uncontroversial rule that the presumption disappears "in fields of regulation that have been substantially occupied by federal authority" of which the regulation of federally chartered banks was one such field. *Id.* (citation omitted.) *Pinney v. Nokia, Inc.*, 402 F.3d 430, 454 n.4 (4th Cir. 2005) rejected applying the *Locke* exception to the wireless telecommunications area because, in contrast to maritime commerce, telecommunications featured both an absence of federal dominance and a presence of considerable State authority.

Public Util. Dist. No. 1 v. IDACORP Inc., 379 F.3d 641, 648 n.7 (9th Cir. 2004) refused to apply the presumption against preemption to the Federal Power Act of 1935 because "the federal government has long regulated wholesale electricity rates." The States were unable to regulate wholesale electrical rates, and indeed the *raison d'être* of the Federal Power Act of 1935 was that "constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated." *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 213 & n.8 (1964). In *UPS v. Flores-Galarza*, 318 F.3d

323, 336 (2003), Puerto Rico did not challenge Congress' "significant – and undisputed – presence in air transportation," but instead unsuccessfully sought to avoid the Federal Aviation Administration Authorization Act's preemption of a complex excise tax scheme that burdened interstate carriers' movement on the ground that the "relevant field" of examination was not aviation at all, but rather taxation.

These authorities conflict with neither each other nor with the California Supreme Court's decision. They provide no basis for this Court's review.

II. THE CALIFORNIA COURT OF APPEAL'S HOLDING IS CONSISTENT WITH FEDERAL AUTHORITY THAT THE FIRST AMENDMENT PROVIDES NO REFUGE FOR COMMERCIAL SPEECH THAT INHERENTLY TENDS TO MISLEAD, CONFUSE AND DECEIVE CONSUMERS

A. Bronco's "Napa Ridge," "Napa Creek Winery" and "Rutherford Vintners" Brand Names Are Inherently Misleading When Used In Wines Made From Non-Napa Grapes

Bronco contends that the First Amendment prohibits California from proscribing its deceptive marketing. False, misleading or deceptive commercial speech enjoys no First Amendment protection whatsoever. As expressed in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980) (citations omitted):

> Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban

> forms of communication more likely to deceive the public than to inform it. . . .

When, as here, the possibility of deception is "self-evident," this Court has held that it "need not require the State to 'conduct a survey of the . . . public before [the Court may] determine that the [advertisement] had a tendency to mislead.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985), *quoting FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965).

Bronco's subject labels underscore the wisdom of BATF's conclusion that "[i]n the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown." 51 Fed. Reg. at 20,481. The brand name is the most prominent and eye-catching component of wine labels. *E.g.*, "NAPA RIDGE" (PA[14] 190-201 & 214-221); "NAPA CREEK WINERY" (PA 202-205); "RUTHERFORD VINTNERS" (PA 206-213). Less prominent on most of the Napa Ridge labels is the language "Coastal Vines" which is sometimes affixed regardless of whether the grapes are from the coast, from Napa (*e.g.*, PA 220) or entirely outside Napa (*e.g.*, PA 219). Still less prominent is the varietal designation (*e.g.*, white zinfandel (PA 219)). Appellations of origin such as Central Coast (PA 214), North Coast (PA 216), Lodi (PA 213), Stanislaus County (PA 206), or Napa Valley (PA 220) also appear on the front label, although many consumers may not understand the nomenclature or the geography involved.

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[14] Respondents will adopt petitioners' citation "PA" to refer to the petitioners' Appendix to the Petition for Writ of Mandate in the California Court of Appeal.

The Legislature held open hearings and took testimony in June and August, 2000, from numerous witnesses, including representatives of NVVA the California Retailers Association, Family Wine Makers of California, wine retailers, winery owners, and petitioners and their counsel. RA 1-17. Comments were received on behalf of wine producers, retailers, the Napa County Board of Supervisors, restaurants and others. (*E.g.*, RA 182, 198, 299, 301, 308, 320, 322, 324, 331.) The California Supreme Court observed:

> Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results presented at the hearings disclosing consumer confusion relating to such labels.

App. 4a-5a, n.5.

B. No Distinction Between Inherently And Potentially Misleading Speech Confers First Amendment Protection On Deceptive Marketing

Petitioners rely on a host of inapposite cases that address facially accurate speech that nonetheless carries a potential to mislead, in which case supplemental disclosure is customarily favored over suppression. *E.g., Ibanez v. Florida Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 138 (1994). Bronco invites this Court to depart from its own precedents and to insulate even patently deceptive commercial speech from regulation unless it is "incapable

of being presented in a way that is not deceptive." Pet. 26. It would be the rare case indeed where the deceptive import of commercial speech was "incapable" of being counteracted with sufficiently drastic and onerous countermeasures. But this Court has never suggested that the First Amendment is equally protective of truthful speech, on the one hand, and misleading speech coupled with a contradictory disclaimer, on the other. Any such rule would effectively disenfranchise the States from exercising authority in an historically settled domain of their police power, namely the protection of consumers from commercial deception and exploitation.

C. BATF Made No Findings That Bronco's Subject Labels Are Not Misleading As To Origin

Bronco argues that the California Court of Appeal failed to appropriately defer to supposed "findings" by the BATF (a) that all misdescriptive geographic brand names that are grandfathered are not misleading, and (b) that all COLAs embody the same individualized determination. Bronco then proceeds to argue that if the California Legislature's "contrary" findings are credited, one would inevitably be led to the conclusion that BATF abdicated its statutory obligations under the FAA Act. These contentions are untenable.

Preliminarily, in assessing a First Amendment commercial speech challenge to a state statute, it is far from clear why any Court would owe "deference" to a federal agency's factual "finding" over a contrary "finding" of the state legislature that passed the statute, particularly where, as here, the history of the subject industry features concurrent federal and state regulation. As the California

Supreme Court concluded, "We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry." App. 71a.

In any event, the findings that Bronco attributes to BATF are entirely illusory. BATF's regulatory history leaves no doubt that BATF believes that a geographic brand name of viticultural significance denotes the origin of the wine – quite the opposite conclusion than Bronco suggests. 51 Fed. Reg. at 20,481. Thus, misdescriptive brand names are disallowed and the modern rule forbids their use irrespective of any supplemental disclosure including as to appellation of origin. 27 C.F.R. § 4.39(i)(1). BATF could not rationally have concluded that while all such brand names are categorically misleading, all those in use before July 7, 1986, magically, are not. Bronco can cite no specific determination that each pre-July 7, 1986 label was not misleading.

Nor do individual COLAs embody any such determination. The Santa Rita Hills rulemaking comments did no more than emphasize that while the BATF conducts a case-by-case review to see whether any other information on the label contributes to misleading consumers, including as to the origin of the product, federal law permits the brand name itself, if grandfathered, to still be used. 66 Fed. Reg. 29,476 (May 31, 2001). Indeed, there is no known case in which a COLA application has ever been refused on the ground that the grandfathered geographic brand name itself is misdescriptive as to origin.

Finally, Bronco suggests that the California Court of Appeal implicitly assumed that BATF "routinely disregards its statutory duty" to act to prevent consumer deception. No such assumption informs the Court's opinion, nor, as a general matter, has any party challenged the wisdom or validity of the grandfather clause as a matter of federal law. In a system of federal and state co-regulation wherein "the BATF has long contemplated that the states will enforce their own stricter labeling requirements,"[15] California's conclusion that local concerns justify a stricter regulation respecting wines bearing the name of its most prestigious grape-growing region neither supports nor depends upon any inference that BATF has abdicated its responsibilities.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[15] App. 57a.

No. 05-653

In The
Supreme Court of the United States

BRONCO WINE COMPANY and
BARREL TEN QUARTER CIRCLE, INC.,

Petitioners,

v.

JERRY R. JOLLY, Director of the Department of Alcoholic Beverage Control; DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, and the NAPA VALLEY VINTNERS ASSOCIATION,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of California**

BRIEF OF AMICI CURIAE 62 WINERIES IN SUPPORT OF PETITIONERS
[Wineries Listed On Inside Cover]

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This brief in support of Petitioners is filed on behalf of the following Amici Curiae:

Winery	County	State
Abundance Vineyards	San Joaquin	California
Amwell Valley Vineyard, Inc.		New Jersey
Bargetto Winery	Santa Cruz	California
Bartlett Maine Estate Winery		Maine
Brookmere Winery		Pennsylvania
Cayuga Ridge Estate Winery		New York
Chateau Diana	Sonoma	California
Chateau Grand Traverse		Michigan
Chateau Julien Wine Estate	Monterey	California
Chicama Vineyards		Massachu-setts
Cimarron Cellars LLC		Oklahoma
Claudia Springs Winery	Mendocino	California
Coulson Winery	El Dorado	California
Dreyer Sonoma Winery	Sonoma	California
Fenn Valley Vineyards		Michigan
Four Chimneys Farm Winery		New York
Glenora Wine Cellars, Inc.		New York
Gold Ridge Pinot	Sonoma	California
Habersham Vintners, Inc.		Georgia
Heck Cellars	Kern	California
Hill Crest Vineyard		Oregon
Hoodsport Winery, Inc.		Washington
Icaria Creek Winery	Sonoma	California

Kelsey See Canyon Vineyards, Inc.	San Luis Obispo	California
Kenwood Vineyards	Sonoma	California
Korbel Champagne Cellars	Sonoma	California
La Buena Vida Vineyards		Texas
Lake Sonoma Winery, Inc.	Sonoma	California
Las Vinas Winery, Inc.	San Joaquin	California
Latah Creek Winery, Ltd.		Washington
Latcham Granite, Inc.	El Dorado	California
Leelanau Wine Cellars, Ltd.		Michigan
McDowell Valley Vineyards	Mendocino	California
Mendocino Hill Winery	Mendocino	California
Mill Creek Vineyards	Sonoma	California
Mount Bethel Winery		Arkansas
Mount Palomar Winery	Riverside	California
Mountain View Vintners	Santa Clara	California
North Salem Vineyard, Inc.		New York
Old Mission Winery		Michigan
Paraiso Vineyards	Monterey	California
Perdido Vineyards		Alabama
Premium Vintners dba Fallbrook Winery	San Diego	California
Qualia, Thomas, dba Val Verde Winery		Texas
Rabbit Ridge Vineyards and Winery	San Luis Obispo	California
Robert Hall Winery	San Luis Obispo	California
Santa Cruz Mountain Vineyard	Santa Cruz	California

Santa Fe Vineyards		New Mexico
Saucelito Canyon Vineyard	San Luis Obispo	California
Sebastiani, Don	Sonoma	California
Shenandoah Vineyards, Inc.		Virginia
Sierra Vista Vineyards & Winery, LLC	El Dorado	California
Sonoita Vineyards, Ltd.		Arizona
Sonoma Creek Winery	Sonoma	California
Sonoma-Cutrer Vineyards	Sonoma	California
Sproul, David C., dba Chatfield Winery	San Joaquin	California
Tennessee Valley Wine Corp.		Tennessee
Valley of the Moon Winery	Sonoma	California
Weibel Incorporated	San Joaquin	California
Wiederkehr Wine Cellars, Inc.		Arkansas
Williamsburg Winery Ltd.		Virginia
Windemere Winery	San Luis Obispo	California

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INTEREST OF AMICI CURIAE[1]

Sixty-two respected wineries representing eighteen states have joined together to present this brief to the Court in support of the Petition for Certiorari filed by Petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. Amici oppose the decision of the California Supreme Court reversing the California Court of Appeal and ruling that Section 25241 of the California Business and Professions Code is not preempted by federal labeling regulations. Amici further oppose the California Supreme Court's denial of review of the California Court of Appeal's ruling that wine labels that comply with federal labeling regulations, and that bear federal approval, can be "inherently misleading" and afforded no First Amendment protection. Amici strongly urge this Court to grant the Petition for Certiorari because Amici, and potentially every other winery in the United States, stand to be harmed by at least two likely results of the California Supreme Court's decision: (1) the enactment of further inconsistent labeling regulations, and (2) the erosion of First Amendment protection for commercial speech.

Amici are core members of the wine industry, from large wineries in California to small and medium-sized wineries across the United States which make wine and grow grapes. Wines produced by Amici are sold to consumers in the United States and throughout the world under a uniform system of national labeling rules developed for the interstate

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[1] The brief was filed with the written consent of all parties, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amici state that no party or counsel to any party authored any portion of this brief, nor did any person or entity, other than Amici and their counsel, make a monetary contribution to the preparation or submission of this brief.

and foreign wine markets. Under this system, all wine industry members currently have a voice in national labeling regulations through the inclusive federal rulemaking process. If the uniform and inclusive federal regulatory system is subject to override via special interest legislation at the state level, the federal system will deteriorate and be replaced by a patchwork of rules sponsored (as in the case below) by politically connected special interest groups. Moreover, if courts are permitted to ignore findings by the federal labeling authorities that specific, federally approved brand names are not inherently misleading, protected commercial speech will lose valuable First Amendment protection, to the detriment of the Amici and consumers.

Amici's ability to continue to offer wines to the consuming public under geographic brand names that have been used for decades without consumer confusion or regulatory problems may be directly affected by this case. Therefore, Amici unite to submit this brief so that the Court has the benefit of the perspective of winemakers from throughout the United States when making the critical decision about whether or not this case should be heard. The livelihoods of Amici, and of thousands of other small wineries, stand to be affected by the Court's decision.

SUMMARY OF ARGUMENT

The federal government has closely regulated the alcoholic beverage industry, and wine labeling, in particular, for nearly a century. In 1935, Congress enacted the landmark Federal Alcohol Administration Act ("FAA Act"), which *inter alia* perfected federal control over the interstate wine markets. *See* 27 U.S.C. §201, *et seq.* The FAA Act directed the Treasury Secretary to enact regulations that would protect wine consumers from deceptive labeling practices and, as a

further protection, prohibited the interstate sale of wines unless the producer first obtained a federal Certificate of Label Approval ("COLA"). *See id.* §205(e) & (f). Pursuant to this mandate, and drawing on a prior extensive federal wine labeling code,[2] the Alcohol and Tobacco Tax and Trade Bureau ("TTB") promulgated comprehensive regulations governing the labeling of wines and implemented the COLA system for wine labels.[3] *See, e.g.*, 1 FED. REG. 83, 86 (Apr. 1, 1936) & 3 FED. REG. 2092, 2096 (Aug. 26, 1938); *see also* 27 C.F.R. Parts 1, 4, 9, 12, 13, 16 & 24 (current federal wine labeling regulations); *see generally Brown-Forman Distillers Corp. v. Mathews*, 435 F. Supp. 5, 16 (D. Ky. 1977) (discussing historic federal regulation of wine labeling and TTB's jurisdiction in the field).

The American wine industry – including Respondent Napa Valley Vintners Association ("NVVA") – long has viewed TTB as "for all practical purposes, ... the sole agency under which the wine industry ha[d] operated since repeal." Letter from NVVA President Jack L. Davies to BATF Director Rex D. Davis (Feb. 23, 1976).[4] However,

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[2] A then newly formed federal agency known as the Federal Alcohol Control Administration adopted a regulatory code for wine labeling following the repeal of prohibition. These regulations were preceded by three decades of active federal oversight of wine labeling by other federal agencies, including the Food & Drug Administration and the Federal Trade Commission.

[3] The TTB is the recent successor to the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The opinions below refer collectively to both agencies as the BATF. Amici follow Petitioner's lead by hereinafter referring to both agencies as the "TTB."

[4] Amici Motion for Judicial Notice at Exh. B ("Amici MJN"). Amici filed a Motion for Judicial Notice in the case before the California Supreme Court, which motion was granted. Therefore, documents referred to herein as exhibits to "Amici MJN" are part of the record below.